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No. 84-17

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT KENT LAHODNY AND BARRY TARLOW, PETITIONERS

v.

PETER NUNEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that they are entitled to declaratory and injunctive relief on the ground that respondents — the United States Attorney for the Southern District of California, an Assistant United States Attorney, and several federal law enforcement officers — violated their Sixth Amendment right to counsel.

1. Petitioner Lahodny was indicted in the United States District Court for the Southern District of California for conspiracy to import marijuana into the United States. Petitioner Tarlow represented Lahodny in this criminal prosecution. Petitioners allege that in the months following the indictment, various government informants and law enforcement officials contacted Lahodny on several occasions and urged him to dismiss his attorney, to plead guilty, and to become an informant. E.R. 3-8.[1] Petitioners do not

[1] "E.R." refers to the Except of Record filed in the court of appeals. We have lodged a copy of this document with the Clerk of this Court.

suggest that Lahodny was persuaded to dismiss Tarlow or to become an informant or that the government agents' alleged importunings affected Lahodny's relationship with Tarlow (E.R. 1-13, 15).

On the basis of these allegations, petitioners filed a motion to dismiss Lahodny's indictment (E.R. 28-50). After a hearing, District Judge Keep denied the motion (E.R. 62-88). Judge Keep ruled that petitioners had failed to demonstrate prejudice and that dismissal of the indictment was not appropriate in the absence of such a showing (E.R. 71-74). In addition, although petitioners attempted to persuade Judge Keep to confine her ruling to the question of prejudice (see E.R. 86-88), Judge Keep stated: "[T]he court finds, number one, there is no showing at all of any government misconduct in this case concerning Mr. Lahodny" (E.R. 74). Judge Keep reviewed the evidence in detail, explaining how it supported this conclusion (see E.R. 76-84). When petitioner Tarlow pressed her to state that her findings concerned only whether there was prejudice and not whether the misconduct had occurred, Judge Keep stated (E.R. 87): "I review[ed] absolutely all the material in my mind very carefully and from everything else that I've seen, I pointed out to you that I've also seen no evidence of misconduct."

2. After Judge Keep's ruling, petitioner Lahodny pleaded guilty to the charges against him and was sentenced. He did not appeal the conviction based on his guilty plea. Instead, petitioners filed this action in the United States District Court for the Central District of California. They alleged a violation of the Sixth Amendment and sought declaratory and injunctive relief. The district court dismissed the complaint on the ground that it failed to allege that petitioners were prejudiced and that under the settled law of the Ninth Circuit, a showing of prejudice is necessary to make out a claim that the Sixth Amendment was violated (E.R. 15,

citing *United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980)). The court of appeals affirmed in an unpublished order (Pet. App. A1-A5). It explained (*id.* at A2-A3):

> We agree with the district court that Lahodny and Tarlow have not stated sufficient facts in their complaint to show that there was a denial of the effective assistance of counsel. Not all governmental interferences with the attorney-client relationship violate the Sixth Amendment right to counsel. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) * * *. The government did not attempt to introduce evidence at trial that was improperly obtained from governmental intrusion into the attorney-client relationship. * * * Nor did the government improperly obtain and use confidential information regarding defense strategy.
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> There is nothing in the complaint to indicate that the government's conduct denied Lahodny the effective assistance of counsel. Lahodny and Tarlow allege that government agents disparaged Tarlow and urged Lahodny to fire Tarlow. However, Lahodny continued to retain Tarlow. There is no allegation that Lahodny's confidence in Tarlow was shaken or that Tarlow's effective defense on behalf of Lahodny was in any way hindered. [2]

3. a. Petitioners assert that this Court should decide the question whether a showing of prejudice is necessary to state a claim of a violation of the Sixth Amendment right to counsel. But however that question is resolved, petitioners'

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[2]Judge Reinhardt concurred in the affirmance of the district court's denial of declaratory relief but said that it was "premature to dismiss, on the basis of the pleadings and a few other materials, the plaintiffs' claim for *injunctive* relief against future action by the United States Attorney that allegedly is designed to interfere with Lahodny's sixth amendment rights" (Pet. App. A4).

claim is barred by collateral estoppel. Judge Keep specifically found that the misconduct that petitioners allege in this complaint had not occurred, and petitioners did not seek review of her ruling. Petitioners therefore are precluded from asserting in this case that such misconduct occurred. See *Allen* v. *McCurry*, 449 U.S. 90 (1980).[3]

We note that to the extent that petitioners' request for declaratory relief is an effort to undermine or challenge Lahodny's conviction, their action is barred for an independent reason: a judgment of criminal conviction may not be collaterally attacked through an action for declaratory and injunctive relief. The proper means of seeking collateral relief from a conviction, if such relief is available, is habeas corpus, coram nobis, or the statutory remedy provided by 28 U.S.C. 2255. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

b. *i.* In addition, petitioners are incorrect in contending that the courts below erred in requiring a showing of prejudice as a necessary element of a Sixth Amendment claim. In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court held that the government did not violate the Sixth Amendment when it permitted an informant to attend meetings at which the defendant and his attorney discussed trial strategy, so long as the informant did not report what he heard to the prosecutors and the informant's attendance at the meetings did not prejudice the defendant in any other respect. *Weatherford* therefore establishes that, contrary to petitioners' contention, government "interference" in the relationship between a defendant and his attorney does not violate the Sixth Amendment unless the defendant is prejudiced. Moreover, last Term, in *United States* v. *Cronic*,

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[3]In both the district court and the court of appeals, the government argued that the effect of Judge Keep's ruling was to bar petitioners from relitigating the question whether the alleged misconduct had occurred. See E.R. 22-24; Gov't C.A. Br. 12-14.

No. 82-660 (May 14, 1984), the Court held that a Sixth Amendment violation based on a claim of ineffective assistance of counsel cannot be established without either an inquiry into an attorney's actual conduct of the trial or a showing of "circumstances [that] ma[k]e it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial" (slip op. 13; footnote omitted). In reaching this conclusion, the Court in *Cronic* stated that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated*" (slip op. 9-10; emphasis added).

Accordingly, *Weatherford* and *Cronic* make it clear that the Sixth Amendment has been violated only when a defendant can show — by reference either to the specific facts of the case or to valid general presumptions — that the challenged conduct had a prejudicial impact on his defense.[4] Petitioners do not even allege that the government's contacts with Lahodny prejudiced them, and they suggest no circumstances giving rise to a presumption of prejudice (see, *e.g.*, *Chadwick* v. *Green*, 740 F.2d 897, 901 (11th Cir. 1984); *Ricalday* v. *Procunier*, 736 F.2d 203, 209 (5th Cir. 1984)).

ii. Petitioners are also incorrect in asserting that this Court should resolve a conflict among the circuits on the question whether prejudice is a necessary element of a Sixth

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[4]See also *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (only the admission into evidence of statements obtained by questioning a suspect after the right to counsel had attached — not the questioning itself — violates the Sixth Amendment); cf. *Scott* v. *United States*, 436 U.S. 128 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

Amendment claim. Petitioners rely (Pet. 15-17) on *United States* v. *Solomon*, 679 F.2d 1246 (8th Cir. 1982); *Wounded Knee Legal Defense/Offense Committee* v. *FBI*, 507 F.2d 1281 (8th Cir. 1974); and *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972).[5] But in *Solomon* and *Wounded Knee*, the courts of appeals neither specifically addressed nor squarely resolved the question raised by petitioners. The language quoted by petitioners from *Wounded Knee* (Pet. 16) is only a general discussion of the right to counsel and is plainly not directed to the question whether prejudice is a necessary element of a Sixth Amendment claim. In *Solomon*, where a criminal defendant alleged not just that law enforcement officers approached him but that they induced him to dismiss his attorney by retaliating against him for retaining the attorney (see 679 F.2d at 1249), the court of appeals only "assume[d,]" for "purposes of argument, * * * that the government's conduct constituted a Sixth Amendment violation" (*id.* at 1250 n.7). Moreover, in *Solomon* the defendant was seeking to overturn his criminal conviction on the basis of the alleged Sixth Amendment violation; *Solomon* does not reveal how the Eighth Circuit would view a claim seeking declaratory and injunctive relief for an alleged violation of the Sixth Amendment.

In *Via*, the court of appeals did appear to hold that a party could show a violation of the Sixth Amendment without establishing prejudice, but *Via* was also not an action seeking declaratory or injunctive relief. Moreover, *Via* antedates both *Weatherford* and *Cronic*. In view of those decisions, it is far from certain that the Third Circuit

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[6]Petitioners also cite two decisions that cannot create a conflict because they have no precedential significance — *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979), rev'd, 449 U.S. 361 (1981), and *Briggs* v. *Goodwin*, 698 F.2d 486 (D.C. Cir.), vacated, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, No. 83-602 (Jan. 9, 1984).

would adhere to the position it took 14 years ago. Indeed, *Cronic* was decided subsequent to all of the court of appeals decisions on which petitioners rely, and the courts of appeals have not yet had an opportunity to develop its implications. In these circumstances, it is incorrect to say that there is a conflict among the circuits requiring resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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